AND
BRIEF

No. 15-118

DEC - 9 2016

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In The
Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF BORDER ACTION NETWORK, BORDER NETWORK FOR HUMAN RIGHTS, EQUALITY NEW MEXICO, SAN DIEGO IMMIGRANT RIGHTS CONSORTIUM, SOUTHERN BORDER COMMUNITIES COALITION, AND TEXAS CIVIL RIGHTS PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

Amici are non-profit organizations that advocate for members of the Mexican-American community in Texas and elsewhere in the border region, particularly on border and civil rights-related concerns. Through this work and their interactions with members of the border community, *amici* can provide important input about the ways in which members of the community are affected by the operations of the United States Border Patrol.

Border Action Network was formed in 1999 and is a human rights community organization based in immigrant and border communities throughout Arizona. Border Action Network is unique in that it not only builds the capacity of on-the-ground organizing and leadership within heavily militarized, criminalized, and marginalized immigrant and border communities, but also carries the local lessons from the border directly to policymakers at a state and national level. Border Action Network's ability, through organizing, research, communications, and advocacy, enables it to expose the ineffectiveness, high cost, and inhumanity of border and immigration enforcement, and its dedication to policy change enables Border Action Network

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[1] No counsel for any party authored the brief in whole or in part and no person or entity, other than the *amici*, their members, or their counsel, made any monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a).

to put concrete, winnable solutions on policymakers' tables.

Border Network for Human Rights ("BNHR") was founded in 1998 for the general purpose of facilitating the education, organization, and participation of marginalized border communities to defend and promote human and civil rights, and to work to create political, economic, and social conditions where every human being is equal in dignity and rights. Most of BNHR's strategies and activities are directed to accomplish four general goals: (1) to strengthen the capacity and organization of impacted border and immigrant communities to voice their opinions, concerns, and solutions on issues such as immigration and enforcement; (2) to establish clear mechanisms for border and immigrant communities to engage in permanent dialogues with policymakers and administration at the local, state, regional, and national levels; (3) for these communities to educate policymakers, stakeholders, and the public on the need for a comprehensive review and reaffirmation of our immigration laws; and (4) to work with and encourage policymakers to enact and implement effective oversight and accountability mechanisms for enforcement policies and practices at the border and in the interior.

Equality New Mexico is a non-profit organization that uses advocacy, outreach, education, and community support to improve the lives of LGBTQ New Mexicans and their families. Through its work, Equality New Mexico helps create a reality of equity, full access, and sustainable wellness. Equality New Mexico

believes that the health and wellbeing of LGBTQ New Mexicans is crucial to creating a stronger, more balanced world.

Since 2007, the ***San Diego Immigrant Rights Consortium*** ("SDIRC") has worked to bring together faith, labor, legal, and community leaders to advocate for policies that promote the civil and human rights of immigrants. SDIRC is comprised of over 40 organizations throughout San Diego County who consist of leaders from the immigrant and refugee communities.

Southern Border Communities Coalition ("SBCC") brings together 60 organizations across the border from San Diego, California, to Brownsville, Texas, and advances the common goal of promoting a safe and strong community for border residents. The coalition was formed in March 2011 as a response to a rash of Border Patrol-perpetrated violence against unarmed border residents and has focused on advocating for border enforcement policies and practices that are accountable and fair, respect human dignity and human rights, and prevent the loss of life in the region. SBCC has engaged in advocacy demanding justice for Sergio Adrián Hernández Güereca, Anastasio Hernandez Rojas, and several other victims of violence at the hands of federal immigration enforcement officers.

Texas Civil Rights Project ("TCRP") is a nonprofit organization that uses legal advocacy to defend voting rights, fight institutional discrimination, reform systems of criminal justice, and protect First Amendment values. With over 25 years of experience, TCRP's

efforts focus on representing low-income and otherwise marginalized members of society. TCRP's interest in this case stems from its years-long work on behalf of victims of civil rights violations at the hands of federal agencies, including the United States Border Patrol, particularly out of TCRP's El Paso and Alamo, Texas offices. The outcome of this case will have a direct impact on TCRP's clients and their families.

SUMMARY OF THE ARGUMENT

A United States Border Patrol agent on the U.S. side of the U.S.-Mexico border shot and killed an unarmed teenage boy on the Mexican side. The boy was playing a game with his friends when the agent started shooting. The boy tried to take cover behind a pillar, but the agent shot him in the face, killing him.

Significantly, every operative fact, except the impact of the bullet that caused the child's death, was committed on United States soil: the Border Patrol agent formed the intent; un-holstered his weapon; took aim; placed his finger on the trigger; squeezed the trigger; discharged his weapon; and the bullet left the chamber. Even though all of this happened on United States soil, the District Court held that it did not have jurisdiction over the boy's parents' civil rights suit because the boy, Sergio Adrián Hernández Güereca, was a Mexican citizen who was killed on the Mexican side of the border. A deeply-divided Fifth Circuit Court of Appeals affirmed. If allowed to stand, the import of

the Fifth Circuit's decision is that along the United States-Mexico border, a coin flip will determine whether legal recourse exists. This Court should reverse.

Amici are advocates for the southern border region, which encompasses 2,000 miles of international border along four U.S. states and six Mexican states and extends 62.5 miles inland on either side.[2] *Amici* believe that the implications of this case are best understood with knowledge of the current state of affairs at the United States-Mexico border. Specifically, *amici* write to highlight three points:

First, Sergio's death cannot be viewed in isolation. *Amici* are painfully familiar with other tragedies involving Border Patrol abuses with facts disconcertingly similar to Sergio's. The common thread among these incidents is that the victims and their families are at once the most vulnerable to Border Patrol abuses and the most powerless to stop them. This Court's decision will affect not just Sergio's family, but also other people injured or killed by the Border Patrol along the entire 2,000 mile length of the border.

Second, the Constitution should protect residents on both sides of the southern border because individuals on both sides are subject to the consequences of the constant presence and far-reaching control of the United States Border Patrol, even when those initial

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[2] *Border Region*, United States-Mexico Border Health Commission, http://www.borderhealth.org/border_region.php (last visited Nov. 7, 2016) [hereinafter *Border Health Commission*].

actions occur entirely on the U.S. side of the border. To achieve the United States' goals of sealing the border, the Border Patrol's authority necessarily extends into the gray area just beyond the southern border into Mexico, allowing U.S. agents to monitor and control residents on both sides of the border. Wherever this authority extends, the Constitution should be a check on Border Patrol actions and a shield for Border Patrol victims.

Third, Constitutional protections should not be limited by cartographic borders because such borders are arbitrary and unclear; they are simply legal constructs. Cartographic borders are neither rational nor practical determiners of a person's Constitutional rights.

Amici therefore submit that the Court should consider the realities of the border region when deciding Sergio's case. United States agents should not get a free pass to violate the Constitution so long as their targets happen to be on the other side of the border. Those injured by Border Patrol abuses should be entitled to Fourth and Fifth Amendment protections.

ARGUMENT

I. Border Patrol Injustices Against Mexican and Other Citizens Have Occurred in the Past and Will Continue to Occur – Without Redress – if the Fifth Circuit's Decision Is Allowed to Stand.

Many people of the border region have suffered under the United States Border Patrol's regime. Between January 2010 and March 2016, at least 46 people died as a result of an encounter with the Border Patrol. In addition to the 46 deaths, at least 26 people were seriously injured by Border Patrol agents, including a minor who was punched in the stomach and a pregnant woman who lost her unborn child after being beaten at a border crossing.[3]

Some of the people targeted by the Border Patrol were attempting to cross the border into the U.S.; others, like Sergio, were not. None should have been subject to lethal force wielded by Border Patrol agents who, under the Fifth Circuit's decision, would be immune from liability. Consider the following examples:

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[3] *Border Patrol Abuse Since 2010*, Southern Border Communities Coalition (Mar. 2016), http://southernborder.org/border-patrol-brutality-since-2010/. In addition to her miscarriage, the woman suffered malformations and is disabled as a result of the Border Patrol beating. *Id.*; *see also Deaths and Injuries in CBP Encounters Since January 2010*, American Civil Liberties Union of New Mexico, 24 (May 19, 2016), *available at* https://www.aclu.org/sites/default/files/field_document/may_2016_dead_and_injured_by_cbp_officials.pdf [hereinafter *ACLU Report*].

- **Ramses Barron Torres.** A Border Patrol agent shot and killed Ramses on January 5, 2011. He was 17 years old. Border Patrol agents were chasing drug smugglers on the U.S. side of the border when one agent fired a shot that passed through the metal fence into Mexico and killed Ramses. The Border Patrol agent who fired claimed Ramses and his friends were throwing rocks at him but Ramses' friend, who witnessed his death, stated that the Border Patrol agent's safety had not been threatened in any way.[4] The Border Patrol agent was not criminally charged.[5]

- **Guillermo Arévalo Pedroza.** Border Patrol agents killed Guillermo on September 3, 2012, while he was picnicking at a Mexican riverfront park with his wife and two daughters. A Border Patrol boat on the American side of the Rio Grande River, apparently chasing a young man swimming across the river, opened fire onto the Mexican park and killed Guillermo. The Border Patrol agents later alleged that the people in the park had

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[4] *More Accounts Emerge Following Deadly Border Shooting*, Nogales Int'l (Jan. 6, 2011), http://www.nogalesinternational.com/news/more-accounts-emerge-following-deadly-border-shooting/article_998a4971-2351-5f03-a8f3-c43dd1d65cfe.html.

[5] Rob O'Dell, *7 Times Rock-Throwing Ended in Deadly Force by U.S. Border Patrol Agents*, AZ Central (Oct. 12, 2016), http://www.azcentral.com/story/news/politics/border-issues/2016/10/10/us-border-patrol-rock-throwing-killing-cases/85670112/.

been throwing rocks at them. No criminal charges have been brought against Guillermo's killer.[6]

➔ **José Antonio Elena Rodríguez.** In October 2012, in an incident strikingly similar to Sergio's, a Border Patrol agent shot and killed José when the agent suspected the teen was part of a group throwing rocks.[7] José was on a busy Mexican street 40 feet from the border and carrying only a cell phone.[8] He was shot as many as seven times, with at least eight additional bullets striking an adjacent wall. An autopsy revealed the youth may have been shot in the back or even after he had already fallen to the ground.[9] José's family brought a case similar to this one that is

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[6] Jason Buch, *Mexican Girl Clutched Her Dying Father*, San Antonio Express-News (Sept. 8, 2012), http://www.mysanantonio.com/news/local_news/article/Father-shot-by-border-agent-while-holding-his-3848597.php.

[7] Michael Marizco, *Border Patrol Shootings Going Unresolved*, Fronteras (Oct. 26, 2012), http://www.fronterasdesk.org/news/2012/oct/26/border-patrol-shootings-going-unresolved/.

[8] José was in Nogales, Sonora across from its American counterpart, Nogales, Arizona. Many residents refer to them as a single town of Ambos Nogales meaning Both Nogales. Mark Binelli, *10 Shots Across the Border*, N.Y. Times (Mar. 3, 2016), http://www.nytimes.com/2016/03/06/magazine/10-shots-across-the-border.html.

[9] Michael Marizco, *Autopsy Suggests Boy Shot by Border Patrol Was Already Down*, Fronteras (Feb. 7, 2013), http://www.ronterasdesk.org/content/autopsy-suggests-boy-shot-border-patrol-was-already-down.

currently on appeal to the United States Court of Appeals for the Ninth Circuit.[10]

- **Juan Pablo Perez Santillán.** A Border Patrol agent shot and killed Juan on July 7, 2012.[11] He was standing on the Mexican side of the Rio Grande River acting as a lookout while others swam across. A Border Patrol agent using a long-range rifle with a high-powered scope shot Juan at least five times. The agent claimed to have seen Juan waiving a gun and also reported rock throwing, but Juan was holding only a sweat rag when he died.[12] The agent was not criminally charged.

- **Anastasio Hernandez Rojas.**[13] Border Patrol agents killed Anastasio on May 28, 2010. He was attempting to cross the border to return to his family in San Diego when Border Patrol agents detained him,

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[10] Rob O'Dell, *Supreme Court Vacancy Ripples Through Case Involving Cross-Border Shooting of Teen in Mexico by Border Patrol*, AZ Central (Oct. 24, 2016), http://www.azcentral.com/story/news/politics/border-issues/2016/10/21/court-jose-antonio-elena-rodriguez-cross-border-shooting-teen-mexico-border-patrol/92490696/.

[11] Melissa del Bosque, *Federal Officials Investigate Fatal Border Patrol Shootings*, Texas Observer (June 18, 2015), https://www.texasobserver.org/federal-officials-probe-fatal-border-patrol-shootings/.

[12] O'Dell, *supra* note 5.

[13] The remaining examples are factually different than Sergio's case because they were not cross-border shootings. We include them to bring the Court's attention to the extent of the problem of cross-border violence by Border Patrol agents.

beat him with a baton, and electrocuted him with a Taser. Anastasio informed the agents that he wished to file a complaint, and the agents brought him alone to an isolated area outside the crossing station.[14] The agents later reported that they were then required to subdue Anastasio because he was resisting. However, an amateur video of those events recorded the voice of Anastasio pleading for help; the eyewitness who recorded the video stated that the agents were beating Anastasio while he was lying prone on the ground, handcuffed and not resisting.[15] The autopsy report ruled Anastasio's death a homicide, but the agent was not criminally charged.[16]

➔ **Carlos La Madrid.** A Border Patrol agent shot and killed 19-year-old Carlos near Douglas, Arizona on March 21, 2011. Carlos was driving a car containing marijuana when the Border Patrol agents arrived. He attempted to flee across the border into Mexico, but one of the agents fired three shots, striking him in the back and killing him. Carlos posed no threat to

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[14] Brian Epstein, *Crossing the Line at the Border*, Need to Know (on PBS), 4:40-6:05 (Apr. 20, 2012), *available at* http://www.pbs.org/wnet/need-to-know/security/video-first-look-crossing-the-line/13597/.

[15] *Id.* at 7:46-9:38.

[16] Dave Rice, *50 Murders by the Border Patrol?*, San Diego Reader (Nov. 14, 2016), http://www.sandiegoreader.com/news/2016/nov/14/ticker-50-murders-border-patrol/#.

the Border Patrol at the time he died; early allegations of rock throwing were determined to be unfounded.[17]

- **Alfredo Yanez Reyes.** A Border Patrol agent shot and killed Alfredo on June 21, 2011. Alfredo and another individual were attempting to cross the border near San Diego, California when the Border Patrol spotted them and began a pursuit.[18] As with Ramses, Carlos, and initially with Sergio, the agent who killed Alfredo claimed that he had been forced to shoot because rocks had been thrown at him.[19] However, it is unknown whether any rocks were thrown at all, nor whether Alfredo was the person who threw anything.[20]

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[17] Jonathon Shacat, *Waiting for Answers One Year After Border Shooting*, Douglas Dispatch (Mar. 21, 2012), http://www.douglasdispatch.com/news/waiting-for-answers-one-year-after-border-shooting/article_30e6022e-a49e-5adc-9dcd-2c86a565315c.html.

[18] Reports say that Alfredo climbed a tree before being shot. Kristina Davis, *Border Chief Sued in Rock-Throwing Death*, San Diego Union-Tribune (May 13, 2015), http://www.sandiegouniontribune.com/sdut-border-patrol-chief-fisher-lawsuit-yanez-rocking-2015may13-story.html. The tree was on the Mexican side of the fence but technically on U.S. soil. *Id.*

[19] The ACLU reported that in at least 9 Border Patrol deaths and one serious injury between January 2010 and May 2016, the Border Patrol alleged that rocks had been thrown at them. *ACLU Report*, *supra* note 3, at 25.

[20] R. Stickney, *ACLU Calls for Probe in Border Shooting*, NBC San Diego (June 22, 2011), http://www.nbcsandiego.com/

As these examples illustrate, Sergio's death was far from an isolated tragedy. If recent history tells its tale, Sergio unfortunately will not be the last victim of the Border Patrol's unfettered control over the borderlands. Under the Fifth Circuit's decision, those who come after Sergio will have no Constitutional protections unless they are fortuitous enough to be standing on American soil when American agents kill them. This approach has the absurd result of protecting those who unlawfully enter into the United States while denying rights to law-abiding Mexican citizens standing in their own country.

II. Because Border Residents Are Under the Control of the Border Patrol, They Must Not Be Denied Constitutional Protections.

The tragedies in the borderlands are a product of aggressive American policies aimed at securing the southern border. These policies have sent 17,500 Border Patrol agents to the region, equipping them with guns and the power to effectively control wide swaths of Mexican territory. Sadly, as described above, Sergio's death is but one example. Sergio was killed on Mexican soil in the deep cement culvert of a dried-up river. On paper, the Border Patrol controls only the area at the top of one side of the culvert, but as this case demonstrates, the Border Patrol exerts its power over the entire area. Where the Border Patrol exercises its

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news/local/ACLU-Calls-for-Probe-in-Border-Shooting-124372389.html.

authority, those harmed by that authority should not be left without recourse.

The growing influence of the Border Patrol began in the 1990s when the United States increased its focus on immigration policies. The strategy at the border shifted from apprehending individuals who crossed into the United States without permission to preventing anyone from trying, causing the Border Patrol's focus to extend past the border into Mexican territory.[21] With this strategy of deterrence came a series of aggressive immigration policies such as Operations Gatekeeper, Safeguard, Rio Grande, and Hold the Line.[22]

United States Customs and Border Protection is now the largest law enforcement agency in the country.[23] There are four times as many agents stationed on

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[21] *See A Culture of Cruelty: Abuse and Impunity in Short-Term U.S. Border Patrol Custody*, No More Deaths, 42 (2011), http://forms.nomoredeaths.org/wp-content/uploads/2014/10/CultureOfCruelty-full.compressed.pdf [hereinafter *A Culture of Cruelty*].

The Border Patrol's primary mission is "reducing the likelihood that dangerous people and capabilities enter the United States between the ports of entry." *Border Patrol Overview*, U.S. Customs and Border Protection (Jan. 27, 2015), https://www.cbp.gov/border-security/along-us-borders/overview [hereinafter *Border Patrol Overview*].

[22] *Backgrounder: Southwest Border Security Operations*, National Immigration Forum, 5-7 (Dec. 30, 2010), https://immigrationforum.org/blog/backgrounder-southwest-border-security-operations/ [hereinafter *Backgrounder*].

[23] Andrew Kennis, *Supreme Court to Decide Fate of Case That Challenges Cross-Border Killings by U.S. Agents*, Vice News

the southern border today than there were in 1992.[24] Additionally, state and local law enforcement officers join in, enforcing federal immigration law under the power granted in Section 287 of the Immigration and Nationality Act, codified at 8 U.S.C. § 1357(g).[25] The influx of agents at the southern border and the power they are granted allow the Border Patrol to control the land and people on both sides of the border.

There is little question that the 15 million people who live in the borderlands acutely feel the presence

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(Mar. 30, 2016), https://news.vice.com/article/supreme-court-cross-border-killing-patrol-agent-usa-mexico.

[24] There were 17,522 Border Patrol agents stationed at the southern border as of the 2015 Fiscal Year and only 3,555 in 1992. *Border Patrol Agent Staffing by Fiscal Year*, United States Border Patrol (Sept. 19, 2015), https://www.cbp.gov/sites/default/files/documents/BP%20Staffing%20FY1992-FY2015.pdf. The rapid growth of Border Patrol agents has caused quality concerns and led to problems with training and supervision. *See* Garrett M. Graff, *The Green Monster: How the Border Patrol Became America's Most Out-of-Control Law Enforcement Agency*, Politico Magazine (Nov./Dec. 2014), *available at* http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220?o=2.

[25] *See A Culture of Cruelty*, *supra* note 21, at 43. Under the 287(g) program, U.S. Immigration and Customs Enforcement can enter into a joint Memorandum of Agreement with state and local law enforcement to delegate the authority of enforcing federal immigration laws. *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/287g (last visited Oct. 26, 2016).

and power of the United States Border Patrol.[26] Interactions with Border Patrol agents are inevitable in the border region. A legal crossing takes an average of 45 minutes; almost 500,000 people legally cross the southern border each day to work, shop, or visit with friends and family.[27] After crossing, border residents are subjected to random checkpoint stops, searches, and interrogations by the Border Patrol.[28] In this context of cross-border life, border residents understand that American border authorities closely monitor their actions.

The Fifth Circuit's decision ignores the realities of the region and cannot be rationally applied. While *amici* recognize that Border Patrol agents have a difficult and important job and that the majority of agents carry out their duties responsibly, the Fifth Circuit's decision upholds a Constitutional loophole that may

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[26] Joshua Breisblatt, *Forum Statement for Record on Fencing, Infrastructure and Technology Border Hearing*, National Immigration Forum, 1 (May 13, 2015), https://immigrationforum.org/blog/forum-statement-for-record-on-fencing-infrastructure-and-technology-border-hearing/.

[27] Waiting times vary among the different crossing stations, ranging from 0 to 90 minutes. *See Best Time to Cross the Border*, Calit2, http://traffic.calit2.net/border/border-crossing-wait-times.php (last visited Oct. 26, 2016). 178,717,453 train passengers, bus passengers, personal vehicle passengers, and pedestrians legally crossed the southern border in 2015. *Border Crossing/Entry Data: Query Detailed Statistics*, Bureau of Transp. Statistics, https://transborder.bts.gov/programs/international/transborder/TBDR_BC/TBDR_BCQ.html (last visited Oct. 31, 2016).

[28] *See Backgrounder*, *supra* note 22; *Border Patrol Overview*, *supra* note 21.

increase the likelihood of future abuse. *Amici* submit that if American policy grants the Border Patrol *de facto* authority over both U.S. and Mexican land, then all citizens within the *de facto* American-controlled area (both American and Mexican) deserve Fourth and Fifth Amendment protections.

III. Cartographic Borders Should Not Signify Where Constitutional Rights End Because They Are Arbitrary.

On a map, the border between the U.S. and Mexico is a sharp black line. The land on one side of that line is one color; the land on the other side is another. Yet the real world is not so clearly defined, so the border cannot be the end-all stopping point for Constitutional protections. In addition to being blurred by the *de facto* control of the U.S. Border Patrol over parts of Mexico, the cartographic border is especially arbitrary at the southern border where culture, policy, and landscape redefine the lines.

Border residents' lives do not fit neatly into one side of the border line or the other, so their location in relation to the border at any given time is not a rational determiner of their Constitutional rights.[29] Many border residents grew up during a time when the

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[29] "While the U.S.-Mexico borderlands resemble border regions in other parts of the world, nowhere else do so many millions of people from two dissimilar nations live in such close proximity and interact with each other so intensely." *Border People*, The University of Arizona Press, http://www.uapress.arizona.edu/Books/bid289.htm (last visited Nov. 7, 2016).

border was more like a bridge than a wall; crossing over for a few hours was an unremarkable part of life. Communities organically sprang up along both sides of the Rio Grande River without much attention paid to the invisible border. Today a steel fence and rigid mindset bisect the lives of borderland residents, but 15 pairs of sister cities such as San Diego-Tijuana and El Paso-Ciudad Juarez still flourish as symbiotic communities.[30] Under the Fifth Circuit's decision, border residents who are part of the same community are treated differently due to an arbitrary, invisible line.

Additionally, cartographic borders should not define where Constitutional protections exist because the United States frequently ignores or redefines its borders to further its immigration policies.[31] Under Section 212 of the Immigration and Nationality Act, 8 U.S.C. § 1182, for example, individuals who cross the border without permission are treated as if they never actually crossed the border, despite standing on, and in

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[30] *See Border Health Commission*, *supra* note 2. Another example is the community spread between Candelaria in Texas and San Antonio del Bravo in Mexico. For generations, families have lived on both sides of the river and "[m]any people in Candelaria view the two towns as one, with a river running through it." Sasha von Oldershausen, *Crossing Over: For Families Living on Both Sides of the U.S.-Mexico Border, Breaching the Divide Is a Way of Life*, Texas Observer (Oct. 10, 2016), https://www.texasobserver.org/candelaria-crossing-over-border/.

[31] *See* Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 Stan. J. C.R. & C.L. 165, 177 (2007) ("[D]ecoupling of legal authority from the geographic borders of the nationstate" extends the state's power "far away from [its] own geographical boundaries").

some cases residing on, United States land.[32] Additionally, the United States creates "polka-dot borders" in places like foreign airports where United States officials can collect information from non-citizens under the US-VISIT program.[33] In a similar vein, the Immigration and Nationality Act allows immigration officers to search ships in foreign ports before they travel to the United States "as though made at the destined port-of-entry in the United States."[34] As these examples illustrate, a cartographic test for Constitutional protection, like the one applied by the Fifth Circuit, makes little sense in the border region.

CONCLUSION

The residents of the border community – American and Mexican citizens alike, regardless of which side of the border they are located on – deserve certain basic Constitutional protections. The fortuity of where an aggressor and victim happen to find themselves

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[32] *See id.* at 171.

[33] *See id.* at 174-75; *see also Notice to Nonimmigrant Aliens Subject to Be Enrolled in the United States Visitor and Immigrant Status Indicator Technology System*, Department of Homeland Security, 69 Fed. Reg. 482, 482 (Jan. 5, 2004), *available at* https://www.dhs.gov/xlibrary/assets/usvisit/USVisitnotice1-5-04.pdf; *see also* Philip Mayor, Note, *Borderline Constitutionalism: Reconstructing and Deconstructing Judicial Justifications for Constitutional Distortion in the Border Region*, 46 Harv. C.R.-C.L. L. Rev. 647, 668 (2011) (using the term "polka-dot borders").

[34] 8 C.F.R. § 235.5(b) (2006); *see also* Shachar, *supra* note 31, at 176.

with respect to an invisible and arbitrary line should not determine whether the victim's Constitutional rights are protected.

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